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OCTOBER TERM, 1975

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL. ED W. HANCOCK, ATTORNEY GENERAL, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATE OF ALABAMA AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATE OF ALABAMA AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

As required by Section 110 of the Clean Air Act, as amended in 1970, 42 U.S.C. 1857 et seq., the State of Alabama submitted to the Environmental Protection Agency a plan for the implementation, maintenance, and enforcement of national air quality standards within its geographic boundaries. This plan was approved by the Administrator of EPA on May 31, 1972.[1]

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[1] 37 Fed. Reg. 10847-8.

Like the plan submitted by the Commonwealth of Kentucky and many other states, the Alabama plan incorporates an extensive permit system as its central operational mechanism. Consequently, the State of Alabama and the Commonwealth of Kentucky share the common interest of insuring that all pollution sources operating within their respective boundaries, including federal facilities, are required to comply with such EPA-approved state permit systems.

The State of Alabama also has an additional and unique interest in the outcome of this case in that it has been litigating for over three years a separate action involving the same issues and the same primary defendant, the Tennessee Valley Authority.[2] A petition for a writ of certiorari in this case filed on behalf of TVA and other federal defendants is presently pending before this Court, and the Court's ruling in the present case will for all practical purposes be dispositive of the Alabama case.[3]

Finally, the State of Alabama has an interest in the Court's interpretation of the citizen suits provision of the Act, Section 304, 42 U.S.C. 1857 h-2, which will necessarily be involved in the Court's resolution of the issues presented in the present case. This interpretation will strongly influence whether Alabama will seek to enforce its air pollu-

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[2] This litigation was commenced on October 20, 1972, almost one month before the State of Kentucky filed the original action in the present lawsuit; **State of Alabama, et al., v. Lynn Seeber, General Manager of Tennessee Valley Authority, et al.,** United States District Court for the Northern District of Alabama, Civil Action No. 72-939.

[3] **Seeber v. Alabama,** No. 74-851; petition for writ of certiorari filed January 6, 1975.

On September 11, 1975, the State of Kentucky moved the Court to consolidate the Alabama case with the Kentucky case. This motion was denied on October 14, 1975.

tion laws against non-federal facilities in federal or state court.[4]

SUMMARY OF ARGUMENT

I.

The sole question for resolution in this case is whether or not Section 118 of the federal Clean Air Act, as amended in 1970, 42 U.S.C. 1857 f, requires federal facilities to comply with state permit requirements. Respondents argue that Section 118 requires federal facilities to comply only with applicable emission standards and compliance schedules, and not state permit requirements. The State of Alabama submits, however, that federal facilities must comply with *all* requirements respecting the control and abatement of air pollution, *especially* state permit requirements.

Alabama's interpretation first finds support in the plain language of the Act itself. Section 118 simply states that federal facilities shall comply with "Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." No distinction is made between emission standards and compliance schedules on the one hand, and all other requirements of federal, state, interstate, and local law on the other, as respondents suggest. In addition, the fact that federal facilities must comply with Section 118 requirements "to the same extent that any person is subject to such requirements" strongly indicates that Congress contemplated that federal facilities must comply with state permit requirements since it is not disputed that non-federal facilities must do so.

The express language of Section 116, 42 U.S.C. 1857 d-1,

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[4] See page 28, below.

directly contradicts respondents' argument that the phrase "requirements respecting control and abatement of air pollution" is synonymous with "emission standards and compliance schedules." That section specifically refers to the same "requirements respecting control or abatement of air pollution" as Section 118, and distinquishes that comprehensive catagory of requirements from the sub-catagory of emission standards and limitations.

Alabama's interpretation gains further support in that Section 118 requires federal facilities to comply with *federal*, as well as state, interstate, and local requirements respecting the control and abatement of air pollution. If these requirements were restricted to emission standards and compliance schedules only, federal facilities would be exempt from the many important federal requirements of the Act as well as most requirements of state implementation plans. Respondents have failed to even suggest an explanation as to why Congress would have intended such a broad exemption for federal facilities.

A careful examination of Section 114, 111, and 110, 42 U.S.C. 1857 c-9, c-6, c-5, further reveals that Congress consistently provided that federal facilities are subject to all state requirements respecting the control and abatement of air pollution from existing sources, but are subject to no such state requirements with regard to new sources. Congress thus expressly recognized the absolute necessity of granting a state complete regulatory authority over existing sources, including federal facilities, as an integral part of its efforts to fulfill the requirements of its implementation plan and effectively achieve and maintain national air quality standards in the most efficient and equitable manner. Such regulatory authority is not necessary with regard to new sources, since there is no real regulatory task

for a state to accomplish. Emission standards for new sources are promulgated by the Administrator and are uniform throughout the country for comparable facilities. Similarly, all new sources are required to be in compliance before operation actually begins.

Respondents rely heavily upon the notion that Section 304 of the Act, 42 U.S.C. 1857 h-2, is the "sole mechanism" available to the states to remedy non-compliance by federal facilities with the requirements of Section 118, and that all such actions are limited by the provisions of that section to actions for violations of emission standards and compliance schedules only. But this argument directly contradicts Section 114 (b)(1), 42 U.S.C. 1857 c-9 (b)(1), which grants a state the authority to enforce information gathering procedures against federal sources, since such procedures are certainly not "emission standards and compliance schedules."

More importantly, the primary mechanism available for state enforcement of Section 118 requirements is the enforcement authority established pursuant to state implementation plans, *not* Section 304 as respondents contend. In fact, Alabama submits that a state pollution control agency could not bring suit against a violator pursuant to Section 304 even if it wanted to, since access to that section is limited exclusively to individual citizens.

Respondents' argument that a state is a person for the purposes of suing a violator pursuant to Section 304 is nonsensical in view of the fact that that section provides that an action may not be commenced against an alleged violator unless the plaintiff has first given 60 days notice of the violation, both to the state in which the violation occurs and to the alleged violator. These notice requirements, together with the restriction of actions to violations of emission

standards and compliance schedules, strongly suggests that Section 204 was exclusively designed to provide a means whereby an individual citizen can trigger state enforcement action against a violator, and then assume the enforcement role if no such action is initiated.

II.

The legislative history of the Act confirms that existing federal facilities must comply with state permit requirements. In fact, a thorough reading of the history indicates that the Conference Committee, which drafted the final version of the Act which became law, specifically redrafted Section 118 to clarify that existing federal facilities must comply with all state pollution control requirements, and carefully integrated this change into other sections of the Act, the exact same sections discussed above which so clearly support a broad interpretation of the final version of Section 118.

The original House version of Section 118 simply required federal facilities to comply with "emission standards" where as the original Senate version required federal facilities to comply with the "requirements of this Act". The Senate provision went on to add that a governor, attorney general; or citizen could seek to enforce the provisions of Section 118 pursuant to Section 304. The State of Alabama tends to agree with respondents that both the original House and Senate versions of Section 118 would have subjected federal facilities to state requirements concerning emission standards and compliance schedules only. But contrary to respondents' suggestion, neither version actually became law.

The Conference Committee instead redrafted Section 118 to state that federal facilities shall comply with "requirements respecting control and abatement of air pollution to

the same extent that any person is subject to such requirements," a more comprehensive phrase, and then redrafted Section 116 of the Act, 42 U.S.C. 1857 d-1, as well, incorporating this same phrase and expressly indicating that it was not synonymous with "emission standards or limitations."

The Conference Committee also omitted the Senate reference in Section 118 to the enforcement of that section by a governor or attorney general through Section 304, making corresponding adjustments to the language of Section 304 to clarify that an individual *citizen* could still sue a federal facility pursuant to that section, but only for a violation of an emission standard or compliance schedule as discussed above. Similarly, the Conference Committee added Section 114 (b)(1), 42 U.S.C. 1857 c-9 (b)(1), relating to state procedures for implementing and enforcing informational requirements, expressly distinguishing that new federal pollution sources would be exempt from state procedures, but that existing federal pollution sources would not.

Respondents' heavy reliance upon the brief Conference Committee comment on Section 118 is totally unfounded. It is obvious from its face that this simple comment is neither a comprehensive nor accurate analysis of the changes made in that section. The first paragraph merely summarizes the original House and Senate proposals without addressing the Conference Committee changes which were made, and the second paragraph, which does attempt to address these changes, is completely erroneous. The actual changes made by the Conference Committee in redrafting the Act, speak far stronger and more clearly than this comment in expressing the congressional intent in passing the Conference Committee's redrafted version of the Act..

III.

The State of Alabama submits that it is solely through the use of conditional permits that Kentucky, Alabama, and many other states are able to fulfill the requirements of their respective implementation plans and accomplish the fundamental purposes of the Act. If deprived of the use of these conditional permits, the success of a state's pollution control program depends exclusively upon the willingness of the polluter to voluntarily cooperate with the state pollution control agency during the three year pre-attainment period.

But voluntary cooperation is not what Congress had in mind when enacting the 1970 Amendments, nor has it proven to be a workable means of ensuring that federal facilities comply with emission and air quality standards on schedule. As one would have expected, "willingness" to cooperate has proven to be a poor substitute for mandatory requirements to do so. On May 31, 1975, only a few weeks before the mandatory attainment deadline in most states, the Environmental Protection Agency recognized that numerous federal facilities would not be in compliance by the deadline, and issued guidelines to determine the status of these facilities, and to establish "public commitments" to abate emissions "as expeditiously as practical." Alabama submits that EPA's efforts in this regard were simply too little too late, and that if the states had been allowed to subject these same federal facilities to the requirements of their respective permit systems three years ago, we would not have this problem before us today.

Alabama believes that regulating pollution sources through the use of conditional operating permits constitutes a fair and logical approach for expeditiously solving the many complex problems involved with retrofitting existing pollu-

tion sources. This mechanism allows for a rational exchange of ideas and trustworthy information between the polluting facility and the regulating agency, and also provides for extensive public participation through public hearings, all as an alternative to "voluntary cooperation" and its concomitant litigation.

IV.

Respondents contend that simply because the Environmental Protection Agency has stated its view that Section 118 does not require federal facilities to comply with state permit requirements, this view is entitled to special consideration by this Court. The State of Alabama does not agree.

The recent case of *Train v. Natural Resources Defense Council*, —U.S.—, 95 S.Ct. 1470, 43 L.Ed. 2d 731 (April 16, 1975) and the cases cited therein indicate that courts will defer to an administrative agency only where there has been a significant degree of detrimental reliance upon the agency's interpretation of the statute in question, and when the agency's interpretation is a "sufficiently reasonable" one. The State of Alabama contends that EPA's view of Section 118 cannot be considered reasonable in view of the plain language and legislative history of the Act to the contrary, and the total failure of voluntary cooperation as an alternative means of accomplishing the general goals and objectives of the Act.

More importantly, however, the federal facility respondents cannot be heard to argue that they have detrimentally relied upon EPA's "interpretation" of Section 118. Here, EPA did not promulgate any regulations concerning the interpretation of Section 118, much less as a part of their original implementation plan guidelines as was the case in

Train v. N.R.D.C. To the contrary, EPA expressly approved the implementation plan submitted by the Commonwealth of Kentucky which provided for an extensive permit system as the principal mechanism for achieving air quality standards in that state. In fact, Kentucky's permit system was apparently the type procedure "encouraged" by EPA, whereas state plans providing for attainment of national standards in three years without enforceable pre-attainment procedures to ensure compliance were looked upon with disfavor.

In addition, the only three examples in the record of an EPA interpretation of Section 118 occurred substantially after the dispute between Kentucky and the federal facility respondents had already ensued. Only later did EPA come to the rescue of these other federal agencies.

Nor can the federal facility respondents claim to be injured in any respect if they are now required by this Court to obtain a permit. To the contrary, it is the states and their respective citizens who are presently suffering the consequences of respondents' decision to contest Kentucky's efforts to properly regulate them.

V.

Finally, the State of Alabama submits that its interpretation of Section 118 gains additional support from the plain language of the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. (Supp. III), 1251, et seq. The FWPCA Amendments established a nationwide scheme to control water pollution analagous to the scheme previously established by the Clean Air Amendments of 1970. Both Acts placed the primary responsibility for pollution control in the states and provided for state plans, promulgated pur-

suant to specific guidelines and subject to EPA approval, as the primary mechanism for fulfilling this responsibility.

Section 313 of the FWPCA Amendments, 33 U.S.C. (Supp. III) 1323, is derived from, and is virtually identical to, Section 118 of the Clean Air Act, and there is no reason to believe that Congress intended the phrase "requirements respecting control and abatement of [air] pollution" to have significantly different meanings in context of these closely related Acts. The FWPCA Amendments share with the Clean Air Act many of the provisions relied upon by the State of Alabama in its argument, but more importantly, each of the Acts have strong independent provisions which, when read in conjunction with one another, provide support for the proposition that federal facilities are subject to state permit requirements under both Acts.

INTRODUCTION

This case presents a question of statutory construction involving the first sentence of Section 118 of the Clean Air Act, as amended in 1970, (the "Act"), 42 U.S.C. 1857 f, which provides that:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, *shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.*" (Emphasis added).

Section 118 is an essential part of the comprehensive 1970 Amendments to the Act which created a new Federal-State scheme to achieve and maintain clean air throughout the country. Pursuant to this scheme the Administrator of the Environmental Protection Agency is required to promulgate, for certain known air pollutants, national air quality standards deemed necessary to protect the public health and welfare, Section 109, 42 U.S.C. 1857 c-4, and the respective states are required to achieve and maintain these air quality standards within their own boundaries. Section 107 (a), 42 U.S.C. 1857 c-2 (a).[5] The enactment of Section 118 was therefore necessary to insure that federal as well as non-federal pollution sources would be subject to pollution control requirements promulgated by the states to fulfill their responsibilities under the Act.

The principal mechanism through which each state is to operate to achieve and maintain air quality standards, and the heart of the scheme established by the 1970 Amendments, is the implementation plan procedure of Section 110. 42 U.S.C. 1857 c-5.[6] Pursuant to that section, each state is required to submit to the Administrator for approval a plan providing for the "implementation, maintenance, and enforcement" of air quality standards within such state.[7] Approval of a plan is conditioned upon, among other things, the following: reasonable notice and hearing must have been provided with regard to the plan submitted;[8] the plan must provide for the attainment of primary ambient air quality standards as expeditiously as practicable but no later than three years from the date of approval of the plan;[9] the plan must include emission limitations, schedules for compliance with such limitations, and other measures necessary to insure attainment and maintenance of the national air quality standards;[10] the plan must provide necessary assurances that the state will have adequate personnel, funding, and authority to carry out the plan;[11] the plan must contain requirements for the monitoring and reporting of emissions by polluting facilities; [12] and, the plan must provide for state authority to act in cases of emergencies which present an eminent and substantial danger to the public health.[13]

The Commonwealth of Kentucky, as required by Section 110, submitted an implementation plan which satisfied each of the above conditions, and the plan was subsequently approved by the Administrator.[14] Like the plans of many

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[5] Section 107 (a) states as follows:

> "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State."

[6] For a discussion of the 1970 Amendments and the states' responsibility with regard to achieving and maintaining national air quality standards, see **Train v. Natural Resources Defense Council,** ____U.S.____, 95 S.Ct. 1470, 43 L.Ed. 2d 731, 737-739 (April 16,1975).

[7] Section 110 (a)(1), 42 U.S.C. 1857 c-5 (a)(1)

[8] Section 110 (a)(2) 42 U.S.C. 1857 c-5 (a)(2).

[9] Section 110 (a)(2), (A)(i), 42 U.S.C. 1857 c-5 (a)(2)(A)(i).

[10] Section 110 (a)(2), (B), 42 U.S.C. 1857 c-5 (a)(2)(B).

[11] Section 110 (a)(2)(F)(i), 42 U.S.C. 1857 c-5 (a)(2)(F)(i).

[12] Section 110 (a)(2)(F)(ii) and (iii), 42 U.S.C. 1857 c-5 (a)(2)(F)(ii) and (iii).

[13] Section 110 (a)(2)(F)(v), 42 U.S.C. 1857 c-5 (a)(2)(F)(v).

[14] Kentucky's implementation plan was originally approved on May 31, 1972. 37 Fed. Reg. 10842.

other states, Alabama included, the Kentucky plan opted for a permit system as the central mechanism for fulfilling the implementation plan conditions and insuring the attainment and maintenance of national air quality standards.[15] These states consequently share a strong interest in insuring that *all* pollution sources, including federal facilities, be subject to the requirements of their respective permit systems.

The sole question for resolution in this case is whether or not Section 118 requires federal facilities to comply with such state permit requirements. The State of Alabama submits that it must and does so require. Respondents argue, however, that Section 118 contemplates a degree of voluntary cooperation and requires federal facilities to comply only with emission standards and compliance schedules, and not state permit requirements. (Resp. Brief, pp. 18-19)[16]

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[15] Such a permit system was apparently one of two approaches encouraged by EPA. See page 45, below, and **Train v. N.R.D.C.**, above, 43 L.Ed. 2d, at 739-740.

A description of the Kentucky permit system, and the manner in which it operates to achieve national air quality standards, is discussed below, pp. 37-39.

[16] Interestingly, respondents strongly emphasized in the court below a distinction between "substantive" and "procedural" requirements of the Act. Requirements in the Kentucky implementation plan relating to permits, it was argued, were procedural in nature, and could not be enforced against federal facilities. [See **Kentucky v. Ruckelshaus**, 497 F.2d 1172, 1175 (6th Cir. 1974); (App. 162)]

The 6th Circuit adopted the distinction urged by respondents. However, in the subsequent 5th Circuit case of **Alabama v. Seeber**, 502 F.2d 1238, 1245 (1974), the Court rejected this substantive-procedure recharacterization of the statutory scheme as "a semantical red herring" drawing "no sustenance from the Act itself" Apparently recognizing the weakness of the substance-procedure distinction, the Solicitor General has subtly but most notably, abandoned reference to these terms in the brief filed on behalf of respondents with this Court.

Respondents' efforts to limit the scope of Section 118 depend primarily upon their reading of the legislative history of that section, and their interpretation of Section 304 of the Act, 42 U.S.C. 1857 h-2.[17] Respondents also contend that the EPA interpretation of Section 118 is entitled to special consideration.[18]

The State of Alabama submits, however, that the plain language of Sections 118, 304, and other provisions of the Act clearly indicates that federal facilities must comply with state requirements other than simply emission standards and compliance schedules — *especially* state permit requirements — and that a thorough reading of the legislative history of these provisions demonstrates that the language used therein was specifically redrafted by the Conference Committee to clarify this point. The same conclusion is reached when the Clean Air Act is compared with the 1972 Water Pollution Control Act Amendments which contain virtually identical language relating to state control over federal facilities. Indeed, considering the essential nature of a state's permit system in its efforts to achieve air-quality standards, and the inadequacy of the voluntary approach suggested by respondents, it is apparent that Congress *must* have intended that federal facilities submit to state permits requirements.

Finally, Alabama submits that EPA's interpretation

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[17] Resp. Brief, pp. 24-31.

[18] Resp. Brief, pp. 31-34.

Respondents have apparently abandoned, along with their substance-procedure distinction, their Sovereign Immunity and Supremacy Clause arguments put forward in the Fifth and Sixth Circuits below.

of Section 118 is not entitled to special consideration, since that agency did not express its view on this matter until well *after* a dispute arose between the Kentucky Air Pollution Control Commission and the various federal facilities located in that state, and neither the various states nor the federal facilities could possibly have relied to their detriment on the EPA interpretation.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE ACT REQUIRES EXISTING FEDERAL FACILITIES TO COMPLY WITH STATE PERMIT REQUIREMENTS.

A. Section 118 requires federal facilities to comply with all requirements respecting control and abatement of air pollution, including state permit requirements.

The State of Alabama submits that the clear and unambiguous first sentence of Section 118 means exactly what it says, federal facilities "shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." This encompasses all requirements of a state implementation plan approved by EPA — including the permit requirements of a state plan — as well as other requirements of state and local law not part of a state plan, and those requirements set out in various other sections of the Act.[19]

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[19] See, for example, Section 111, 42 U.S.C. 1857 c-6; Section 112, 42 U.S.C. 1857 c-7; Section 114, 42 U.S.C. 1857 c-9; Section 115, 42 U.S.C. 1857 d; and Section 303, 42 U.S.C. 1857 h-1.

The broad and comprehensive language of Section 118 provides no support whatever for respondents' distinction between emission standards and compliance schedules, and all other requirements of federal, state, interstate, and local law. In fact, the original bill which passed the House of Representatives required federal facilities to "comply with Federal, State, interstate, and local emission standards. . . .", but this language was expressly changed in the final version which became law.[20]

A broad interpretation of Section 118 is supported by the fact that federal facilities must comply with these requirements "to the same extent that any person is subject to such requirements." Since it is not disputed that *non*-federal facilities must comply with all requirements respecting control and abatement of air pollution, including state permit requirements, it therefore follows that a federal facility, which must comply with these requirements to the same extent as non-federal facilities, must comply with state permit requirements as well.[21]

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[20] H.R. 17255, 91st Cong. 2d Sess. (1970); Section 110 amending Section 111 of the Clean Air Act of 1963.

For a complete discussion of the legislative history of Section 118, see pages 30-36, below.

[21] It should also be noted that Section 118 applies to federal facilities or activities "resulting, **or which may result,** in the discharge of air pollutants". (Emphasis added).

This language is inconsistent with respondents' interpretation of Section 118. The "requirements" with which federal facilities must comply cannot be limited strictly to emission standards and compliance schedules since those requirements are meaningless with respect to a facility which is not in fact polluting. It must be concluded, therefore, that potential federal pollution sources are to be regulated before the fact, by the use of a mechanism such as a permit system, in order to prevent future violations.

Such an interpretation gains further support from the fact that Section 118 specifically requires federal facilities to comply with *federal*, as well as state, interstate, and local, requirements respecting control and abatement of air pollution. If these requirements are restricted to emission standards and compliance schedules only, federal facilities would not only be exempt from most requirements of state implementation plans, but in addition would be exempt from the requirements of Section 114, 42 U.S.C. 1857 c-9, regarding right of entry and inspection, monitoring, sampling, reporting, and record keeping; the federal emergency powers requirements of Section 303, 42 U.S.C. 1857 h-1; the requirements of implementation plans promulgated by EPA pursuant to Section 110 (c), 42 U.S.C. 1857 c-5 (c), and any other federal requirements set out in the Act. Respondents have failed to even suggest an explanation as to why Congress would have intended to exempt federal facilities from supervision by another federal agency. Indeed, as discussed below, such an interpretation would be contrary to the express congressional purpose in providing for stricter control of federal facilities through the 1970 Amendments.[22]

B. Section 116 affirms that requirements respecting control and abatement of air pollution are not limited to emission standards and compliance schedules.

The express language of Section 116, 42 U.S.C. 1857 d-1, directly contradicts respondents' contention that the phrase "requirements respecting control and abatement of air pollution" as used in Section 118 should be interpreted to mean only emission standards and compliance schedules. That section states in relevant part as follows:

> ". . . [N]othing in this Act shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce *(1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution;* except that if an emission standard or limitation is in effect under an applicable implementation plan or under Section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section." (Emphasis added).

It is obvious from the language of Section 116 that Congress did not equate "requirements respecting control or abatement of air pollution" with "emission standards or limitations" as respondents would have us believe, especially in view of the fact that Section 116 was drafted by the Conference Committee — the *same* committee which expressly rejected the House language restricting federal compliance to emission standards and substituted in lieu thereof the broader duty of complying with all state requirements respecting control and abatement of air pollution. It is most unlikely that the Conference Committee, after specifically dealing with these two phrases, would have used them inconsistently in these closely related sections of the Act.[23]

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[22] See page 39, below.

[23] See H. R. Rep. No. 91-1783, 91st Cong. 2d Sess. 48 (1970).

For a complete discussion of the legislative history of the Act as it specifically relates to the changes which the Conference Committee made in Sections 118, 116, and other sections of the Act, see pages 33-35, below.

Respondents' attempt to avoid the impact of Section 116 by arguing that the phrase "any standard or limitation respecting emissions of air pollutants" and the phrase "any requirement respecting control or abatement of air pollution" are mutually exclusive fails rather badly. (Resp. Brief, 20-21). The logical reading of Section 116 is that a "standard or limitation respecting emissions of air pollutants" is a subcategory of the broader class of "requirement[s] respecting control or abatement of air pollution", *not* an entirely separate class in itself.[24]

Respondents' efforts to gain support for their interpretation of Section 118 through other portions of the Act are equally without merit. (Resp. Brief, p. 21). Although it is possible that Section 110 (e)(1)(A), 42 U.S.C. 1857 c-5 (e)(1)(A), refers primarily to only those requirements regarding emission standards as respondents suggest, the word "requirements" as used in other portions of Section 110 [e.g., Section 110 (a)(3), 42 U.S.C. 1857 c-5 (a)(3); Section 110 (c)(2), 42 U.S.C. 1857 c-5 (c)(2); and Section 110 (c)(3), 42 U.S.C. 1857 c-5 (c)(3)], obviously refers to the entire range of implementation plan requirements incorporated in the Kentucky permit system, including monitoring, reporting and record keeping, emergency episode plans, inspections, and other measures necessary to insure attainment and maintenance of air quality standards.[25]

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[24] Even if Section 116 is interpreted as respondents suggest, such an interpretation directly contradicts their principal argument that "requirement respecting control or abatement of air pollution" is synonymous with "emission standards and compliance schedules."

[25] Note also the reference in Section 113 (a)(3), 42 U.S.C. 1857 c-8 (a)(3), to the "requirements" of Section 114.

C. The Act distinguishes between state authority over new and existing federal pollution sources.

A careful examination of Sections 114, 111, and 110 of the Act[26] reveals that Congress carefully and consistently distinquished between state authority over new federal pollution sources, and state authority over existing federal pollution sources. Federal facilities are subject to *all* state requirements respecting the control and abatement of air pollution from *existing* sources, but are subject to *no* such state requirements with regard to *new* sources.

Section 114 (b)(1), 42 U.S.C. 1857 c-9 (b)(1), for example, which deals with record keeping, reporting, monitoring, sampling, and the right of entry and inspection, provides as follows:

> "Each State may develop and submit to the Administrator a procedure for carrying out this section in such State. If the Administrator finds the State procedure is adequate, he may delegate to such State any authority he has to carry out this section (except with respect to *new* sources owned or operated by the United States)." (Emphasis added).

By specifically authorizing a state to develop a procedure for carrying out this section with respect to all sources except *new* sources owned or operated by the United States, it is apparent that a state *does* have such authority with respect to *existing* federal sources.

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[26] 42 U.S.C. 1857 c-9, c-6, and c-5.

The State of Alabama submits that the "procedure for carrying out" section 114 which has been developed and submitted by the State of Kentucky is, in fact, *the permit procedure which is the subject matter of the present lawsuit.*[27] But whether or not the Administrator has technically "delegated" his authority to the State of Kentucky pursuant to Section 114 (b)(1) by approving the Kentucky implementation plan, it is apparent that the Kentucky permit system satisfies the conditions of Section 114 (b)(1), and it is equally apparent that Section 114 (b)(1) subjects existing federal pollution sources to "requirements" other than emission standards and compliance schedules.

The disparate treatment accorded new and existing federal sources is also exhibited in Sections 111 and 110 of the Act. 42 U.S.C. 1857 c-6 and c-5. Section 111 (c)(1) expressly exempts new sources owned or operated by the United States from state procedures for implementing and enforcing standards of performance for new sources promulgated by the Administrator. However, Section 111 (d), which provides for state "implementation plans" to establish, implement, and enforce standards for *existing* sources for which air quality criteria have not been issued, does *not* exempt federal facilities from the requirements of such plans. This is, of course, consistent with the fact that Section 110, which concerns implementation plans for the control of existing pollution sources for which air quality criteria have been issued, and upon which Section 111 (d) is modeled, simi-

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[27] Note that the informational requirements of Section 114 are virtually identical to the implementation plan requirements of Section 110 (a)(2)(F), 42 U.S.C. 1857 c-5(a)(2)(F), which are carried out via the Kentucky permit system submitted to and approved by EPA. See page 38, below.

larly does not exempt federal facilities from its requirements. Obviously, when Congress intended to exempt a federal facility from a particular requirement in the Act, it clearly and expressly set out the exemption.[28] In the absence of any such exemption, federal facilities are subject to all the requirements of the Act to the same extent as any other person.

Respondents argue that the express exemptions of Section 111 (c)(1) and Section 112 (d)(1) are consistent with their interpretation of Section 118 that federal facilities are required to comply with state emission standards and compliance schedules only, and that these express exemptions for new federal sources should be carried over and applied *sub silentio* to existing federal sources. (Resp. Brief, 23-24) But this contention is patently incorrect since Sections 111 and 112 both specifically prohibit a state from *enforcing* emission standards against new federal sources as well as developing procedures to implement these standards. If existing federal sources were exempted in the same manner as new federal sources, Section 118 would be rendered meaningless since there would be no state requirements with which federal facilities would be required to comply.

By granting the states more authority over existing federal pollution sources than new federal sources, Congress recognized the different nature of control required for each class of facility. In dealing with existing sources, of course, the first task is to determine the general quality of the air in the relevant geographic region and then compute the respective amounts of pollution attributable to the emissions

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[28] See also Section 112 (d)(1), 42 U.S.C. 1857 c-7 (d)(1), regarding hazardous air pollutants.

of each individual facility therein. Next, appropriate emission standards necessary to clean the air must be assigned to the various polluting facilities, and compliance schedules, emergency procedures, and operating time requirements must be established for each individual facility to insure that the public health and welfare is not endangered during the period preceding final attainment of the relevant emission and air quality standards. In conjunction with these efforts data must be generated with regard to the nature of each individual facility's operation, the type and amount of its emissions, and the actions which it has taken towards achieving final compliance.

For this formidable task to be conducted properly each existing pollution source must necessarily be regulated as an integral part of the control effort throughout the entire geographic region, and it is therefore imperative that the states, who have the responsibility under the Act for this control effort, be granted complete authority over all existing sources, including federal facilities, to insure that the public health and welfare is protected in the most efficient and equitable manner.[29]

Controlling new sources is not so complex. Emission standards are promulgated by the Administrator and are uniform throughout the country for comparable facilities. Consequently, there is no real need for a comprehensive and flexible regulatory mechanism to evaluate and control each individual facility as part of a coordinated clean-up effort, nor

[29] This is especially true considering the fact that federal facilities, such as respondent TVA, are often the largest polluters in a given air quality control region.

is there any compelling need for access to information concerning a particular facility's emissions or mode of operation. Similarly, since all new sources are required to be in compliance before operation begins,[30] there is no need for compliance schedules to be developed or for preattainment operating time or emergency procedures to be established.

D. Section 304 does not restrict state actions against federal facilities to actions for violations of emission standards and compliance schedules.

Crucial to respondents' attempt to limit the coverage of Section 118 to emission standards and compliance schedules is their interpretation of Section 304 of the Act, 42 U.S.C. 1857 h-2. Respondents contend, as did the 6th Circuit before them, that Section 304 is the "sole mechanism" available to the States to remedy non-compliance by federal facilities with the requirements of Section 118, and pursuant to Section 304 (a)(1), 42 U.S.C. 1857 h-2 (a)(1), all such state actions are limited to violations of emission standards and compliance schedules.[31] Since Section 304 (a)(1) is the only section in the entire Act which treats emission standards and compliance schedules as a category separate and apart from all other requirements respecting control and abatement of air pollution, in the absence of this connecting link between Section 118 and Section 304, respondents' argument in this case fails completely.

Respondents' interpretation of Section 304 is manifestly incorrect. In the first place, to argue that Section 304 limits state actions against federal facilities to violations of emis-

[30] See Section 111 (e), 42 U.S.C. 1857 c-6 (e).

[31] See respondents' brief, pages 25-27; and **Kentucky v. Ruckelshaus**, 497 F.2d 1172, 1177 (6th Cir. 1974); (App. 168).

sion standards and compliance schedules directly contradicts Section 114 (b)(1), 42 U.S.C. 1857 c-9 (b)(1), which grants a state the authority to enforce information gathering procedures against existing federal sources, since record keeping, reporting, monitoring, sampling, and the right of entry and inspection are certainly not "emission standards or limitations" as defined in Section 304 (f), 42 U.S.C. 1857 h-2 (f).

More importantly, Section 304 cannot be considered as the "sole mechanism" available for state enforcement of Section 118 requirements since the primary means of state enforcement against all facilities, federal as well as state, is through the enforcement authority established pursuart to the requirements of EPA approved state implementation plans.[32] Contrary to respondents' suggestion (Resp. Brief, p. 25 fn. 30), this authority is not restricted in any manner to actions in state court against non-federal facilities. A state action for a pollution violation may be brought against a federal defendant in any proper court, state or federal, pursuant to a valid jurisdictional grant. Indeed, a case in point is the *Seeber* case, above, in which the original complaint filed in the U. S. District Court specifically alleged federal question jurisdiction and was brought pursuant to the enforcement provisions of the Alabama Air Pollution

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[32] Section 110 (a)(1) and (a)(2)(F), 42 U.S.C. 1857 c-5 (a)(1) and (a)(2)(F); Section 111 (d)(1), 42 U.S.C. 1857 c-6 (d)(1).

The original House version of the Act, which expressly limited state control of federal facilities to emission standards, did not even have a citizen suits provision, and the Senate version, which provided that a governor or attorney general may enforce Section 118 requirements pursuant to Section 304, was expressly omitted from the final Act. A complete discussion of the legislative history of these sections appears at pages 30-35, below.

Control Act as incorporated in Alabama's implementation plan and approved by EPA.[33]

Moreover, it is the position of the State of Alabama that a state pollution control agency *could not* bring suit pursuant to Section 304 even if it wanted to since access to that section is limited exclusively to individual citizens. Although it is true that the term "person" is defined in the general definitional section of the Act, Section 302 (e), 42 U.S.C. 1857 h(e), to include a state, that general definition should logically be interpreted in context of Section 304

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[33] **State of Alabama, et al., v. Seeber, et al.,** United States District Court for the Northern District of Alabama, Civil Action No. 72-939, Paragraphs 1 and 2.

With all due respect, the State of Alabama submits that the misinterpretation of Section 304 reflected in the opinion of the 6th Circuit in **Kentucky v. Ruckelshaus,** and the consequent conflicting holding with the 5th Circuit in **Seeber,** may well be attributable to confusion on the part of the Kentucky Attorney General with regard to the exact manner in which he was proceeding against the respondents. For example, although Kentucky alleges federal question jurisdiction with an amount in controversy exceeding $10,000 (App. 6) which would be unnecessary in an action brought pursuant to Section 304 [See Section 304 (a)], the lower court opinions reflect that Kentucky later took the position that their action was brought, at least in part, pursuant to Section 304. (App. 148; 162-3). The State of Alabama did not take such a position in its case.

Similarly, the Commonwealth of Kentucky sued the Administrator, apparently pursuant to Section 304, for failure to commence appropriate actions against the federal facilities with regard to the Kentucky permit requirements. (App. 137, 167). The State of Alabama, on the other hand, voluntarily dismissed its claim against the Administrator making clear its position that its action was brought pursuant to the enforcement provisions of its implementation plan only.

By inadvertantly basing its suit on Section 304, Kentucky apparently jeopardized its position on the merits by lending credence to respondents' erroneous argument that state actions against federal facilities are limited by that section to violations of emission standards and compliance schedules.

to mean that state facilities, as well as private facilities, are subject to *being sued* by a citizen, not that a state can sue as a citizen. This is the manner in which this term is used throughout the Act[34] as well as in the predecessor Air Quality Act of 1967, P.L. 90-148, from which the general definitional section of the Act was taken intact, and which did not even have a citizen suits' provision. Such an interpretation also explains the reference in Section 304(a)(1)(ii) to the Eleventh Amendment which, of course, concerns suits against a state filed by individual citizens of another state.[35]

To argue that a state is a person for purposes of suing a violator pursuant to Section 304(a)(1) is non-sensical in light of the express provisions of Section 304 and the Congressional purpose in enacting that section. Not only is Section 304 entitled "citizen suits," it also provides for court awarded attorneys' fees, hardly a provision one would find outside the realm of private litigation.[36] More importantly, Section 304 also provides that no action may be commenced against an alleged violator pursuant to that section unless the plaintiff has first given 60 days notice of the violation to both the Administrator and the state in which the violation occurs, *and* to the alleged violator. If either the state or

[34] See especially the manner in which the word "person" is used in Section 118, 42 U.S.C. 1857 f, and Section 113, 42 U.S.C. 1857 c-8.

[35] If a state is a "person" for purposes of bringing a Section 304 action, this would apparently apply equally to actions against non-federal, as well as federal, facilities. The State of Alabama has never brought an enforcement action against a non-federal facility, or a federal facility, in federal court pursuant to Section 304 under the assumption that it could not do so. Although Alabama believes that it has been correct in this assumption, it is certainly interested in this Court's interpretation of this section since a holding consistent with respondents' position would greatly increase Alabama's access to the federal courts in air pollution cases generally.

[36] Section 304(d), 42 U.S.C. 1857 h-2(d).

the Administrator commences an action against the violator within the 60 day period, or if the violator complies with the law within that time, the citizen is barred from filing his suit.[37] Section 304 cannot possibly include suits by state agencies as respondents suggest since there is no reason whatsoever for a state to be required to notify itself and the violator, and then wait 60 days before commencing an enforcement action.[38]

The Congressional purpose in adding Section 304 to the Act is readily apparent from the plain language of that section itself. The Act contemplates that the states, through their implementation plans, will generate and evaluate air quality and emissions data, develop emission standards and compliance schedules for each pollution source, and enforce violations or take whatever other action is necessary to insure compliance with the various implementation plan requirements. In the event that the responsible state or federal agency does not fulfill its enforcement obligations under the Act against a violator, Section 304 provides a means whereby an individual citizen may assume the enforcement role to insure that the provisions of the Act are expeditiously carried out. The role of the individual citizen, however, is primarily one of triggering the enforcement mechanism. It is only when the mechanism does not respond that the citizen is provided an opportunity to actually file suit, and then such

[37] Section 304(b), 42 U.S.C. 1857 h-2(b).

[38] To require a state to notify a violator and then wait 60 days before commencing an enforcement action would be especially disastrous with regard to air pollution emergencies when immediate action is an absolute necessity.

Interestingly, even if a state is considered a person for purposes of suing a violator, Section 304 (e), 42 U.S.C. 1857 h-2 (e), expressly allows a suit to be brought by a state pursuant to **state** law to enforce an "emmission standard or limitation or **to seek any other relief.**" (Emphasis added).

suits are limited to violations of emission standards and compliance schedules, violations which can typically be proven in a direct fashion either through simple discovery or on the basis of data already compiled and evaluated by the relevant state agency. This restricted access to the courts logically does not apply to *state* actions against a violator.[39]

II. THE LEGISLATIVE HISTORY OF THE ACT CONFIRMS THAT EXISTING FEDERAL FACILITIES MUST COMPLY WITH STATE PERMIT REQUIREMENTS.

Respondents' efforts to limit the scope of Section 118 despite the plain language of the Act to the contrary realistically rests exclusively upon their reading of the legislative history of Sections 118 and 304. The State of Alabama submits, however, that a thorough understanding of the legislative history of these and other sections of the Act shows that the Act was purposely redrafted to clarify that existing federal facilities must comply with all state pollution control requirements, and not just emission standards and compliance schedules as respondents suggest.

The original House version of Section 118 as reported out of the House Committee on Interstate and Foreign Commerce stated that all federal facilities

> ". . . shall comply with the applicable Federal, State,

[39] It is possible that a state may bring an action against the Administrator pursuant to Section 304 (a)(2), 42 U.S.C. 1857 h-2 (a)(2), since most of the reasons for restricting Section 304 actions to individual citizens apply only to suits against a violator. Although, as explained above, the State of Alabama voluntarily dismissed its action against the Administrator in the **Seeber** case, it does not take the position that such an action would necessarily be prohibited.

> interestate and local *emission standards* and with the purposes of this Act. . . ." H.R. Rep. No. 91-1146 91st Cong., 2d Sess. 34 (1970) (Emphasis added).

The Senate version as reported out of the Senate Committee on Public Works, however, used different terminology, providing that federal facilities

> ". . . shall comply with the *requirements of this Act* in the same manner as any person must so comply. . . ." (Emphasis added).

The Senate provision went on to add in subsection (b) that

> ". . . the Governor, the attorney general or any citizen of any State in which any Federal property, facility, or activity is located may seek to enforce the provision [sic] of this section pursuant to section 304 of this Act."
>
> S. Rep. 91-1196, 91st Cong., 2d Sess. 100 (1970).

The final version of Section 118, as drafted by the Conference Committee and enacted into law, uses terminology which differs from both the House and Senate version, providing that federal facilities

> ". . . shall comply with Federal, State, interstate, and local *requirements respecting control and abatement of air pollution* to the same *extent* that any person is subject to such requirements." 42 U.S.C. 1857f (Emphasis added).

In addition, the Conference Committee omitted all reference to enforcing the provisions of Section 118 through Section 304.

Respondents' principal argument is that although the

House version of Section 118 refers to "emission standards," whereas the Senate version uses the term "requirements", both the House and Senate committee reports state that federal facilities are required to meet "emission standards", thereby allegedly equating the House and Senate terminology. It is then argued that the Conference Committee "simply combined" the House and Senate provisions without expanding their limited scope.[40] Respondents further contend that the reference in the Senate version to actions by a Governor or attorney general to enforce Section 118 pursuant to Section 304 further indicates congressional intent to limit state actions against federal facilities, since Section 304 actions are so limited.[42]

It is certainly true, as respondents suggest, that the original House version of Section 118 would have required federal facilities to comply only with state emission standards, since this was the precise language used in that section. However, it is equally apparent that the House bill contemplated that state actions would be brought in proper court pursuant to state law and/or the enforcement provisions of state implementation plans, since that bill did not even have a citizen suit provision.[43]

The Senate version of Section 118 is more ambiguous, but the State of Alabama also tends to agree with respondents that in view of the Committee comment[44] and sub-

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[40] Resp. Brief, pp. 27-30. Interestingly, neither the original language of the House bill, nor any of the committee reports, mentions that federal facilities must comply with compliance schedules as respondents admit they must.

[42] Resp. Brief, pp. 25-26.

[43] H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. (1970).

[44] S. Rep. No. 91-1196, 91st Cong. 2d Sess. 23 (1970).

section (b) of the Senate version of Section 118, the "requirements of this Act" referred to are probably the requirements listed in the Senate citizen suits provision, Section 304 (a)(1) — namely, compliance schedules, emission requirements, standards of performance, emission standards, and prohibitions.[45]

But contrary to respondents' suggestion, the Senate version of Section 118 did not become law, nor was it "simply combined" with the House version of that section. Rather the Conference Committee *specifically redrafted* Section 118 to clarify that existing federal facilities must comply with *all* state pollution control requirements — not simply emission standards or requirements — and carefully integrated this change into other sections of the Act, the exact *same* sections which so clearly support the broad interpretation of the final version of Section 118 as discussed in the first section of this brief, above.[46]

The Conference Committee first redrafted Section 118 to require federal compliance with all "requirements respect-

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[45] S. Rep. No. 91-1196, 91st Cong. 2d Sess. 122 (1970).

The State of Alabama does not agree, however, that subsection (b) of the Senate version of Section 118 was intended to limit state actions enforcing that section to actions pursuant to Section 304. Subsection (b) of the Senate proposal states that the Governor or attorney general **may** seek to enforce Section 118 pursuant to Section 304. Like the House, the Senate recognized that state actions could be brought in proper court against federal facilities pursuant to the enforcement authority of a state implementation plan.

[46] The Conference Committee report was ordered to be printed on December 17, 1970. [H.R. Rep. No. 91-1783, 91st Cong. 2d Sess. (1970)], exactly three months after the Senate Committee ordered its report to be printed. S. Rep. No. 91-1196, 91st Cong. 2d Sess. (1970). During this time the Conference Committee made several changes and innovations throughout the bill which do not correspond with the House and Senate proposals.

ing control and abatement of air pollution", a more comprehensive phrase.[47] The Committee then completely redrafted Section 116 of the Act, incorporating for the first time the phrase "requirement respecting control or abatement of air pollution" and expressly providing, contrary to respondents' argument, that such a requirement is not synonymous with an emission standard or limitation.[48] Similarly, the Conference Committee added Section 114 (b)(1), 42 U.S.C. 1857 c-9 (b)(1), relating to state procedures for implementing and enforcing informational requirements, and expressly stated that *new* federal pollution sources would be exempt from such state procedures, but that *existing* federal pollution sources would not.[49]

The Conference Committee also specifically omitted the Senate reference in Section 118 to the enforcement of that section through Section 304. Since the Conference Committee version of Section 304, like the earlier Senate version, expressly limited citizen suits against a violator to actions concerning emission standards and compliance schedules, this was necessary to insure that state actions against federal facilities would not be so limited. The phrase "including . . . the United States" in Section 304 (a)(1), 42 U.S.C. 1857

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[47] The Conference Committee also required that federal facilities comply with these requirements "to the same **extent** that any person is subject to such requirements" changing the Senate language which required compliance "in the same **manner** as any person."

[48] See pages 18-20, above. Compare the language of Section 116, 42 U.S.C. 1857 d-1, to the House and Senate versions of this section. H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 32, 33 (1970) and S. Rep. 91-1196, 91st Cong., 2d Sess. 90, 91 (1970).

[49] Compare Section 114 (b)(1) to the Senate and House proposals which did not provide for such state procedures. S. Rep. 91-1196, 91st Cong., 2d Sess. 97, 98 (1970) and H.R. Rep. No. 91-1146, 91st Cong. 2d Sess. 28 (1970).

h-2 (a)(1), and the phrase "including a requirement applicable by reason of Section 118", Section 304 (f), 42 U.S.C. 1857 h-2 (f), however, were then added to clarify that a *citizen* could still sue a federal facility pursuant to Section 304, but only for violations of emission standards and compliance schedules as discussed above.

Pursuant to the Conference Committee changes, a state can, of course, continue to bring actions against federal facilities pursuant to independent state authority, or the enforcement authority of its implementation plan, to enforce *all* state requirements respecting control and abatement of air pollution, not just emission standards and compliance schedules. Contrary to respondents' suggestion in their brief, the parenthetical phrase in Section 304 (f) in no way suggests that emission standards and compliance schedules are the *only* requirements of Section 118.

The actual changes made by the Conference Committee speak louder than the Committee comment on Section 118 so heavily relied upon by respondents. That comment, in its entirety, is as follows:

> "The House bill and the Senate amendment declared that Federal departments and agencies should comply with applicable standards of air quality and emissions.
>
> "The conference substitute modifies the House provision to require that the President rather than the Administrator be responsible for assuring compliance by Federal agencies." H.R. Rep. 91-1783, 91st Cong. 2d Sess. 48 (1970).

Respondents' argument that this brief summary proves that the Conference Committee did not expand the scope of state control over federal facilities is completely without

merit. It is obvious from its face that this simple comment does not purport to be a comprehensive analysis of the changes made in that section, nor is it an accurate one. The first paragraph simply summarizes the original House and Senate proposals without addressing the Conference Committee changes. The second paragraph, which *does* attempt to address these changes, is ridiculously in error. Nowhere in the legislative history is there any indication whatever that either the President or the Administrator is in any sense "responsible for assuring compliance by federal agencies." To the contrary, the only reference to the President or the Administrator in either bill was specifically directed toward the power to *exempt* federal facilities from state control if in the paramount interest of the United States to do so.[50]

The State of Alabama is quite simply amazed at respondents' attempt to use this obvious mistake of the Conference Committee as a foundation for their newly-created argument that the President, rather than the states, has the primary duty to insure compliance with federal facilities (Resp. Brief, pp. 30-31), and for their subsequent contention that the December 19, 1973 Executive Order of the President should be entitled to weight in determining the proper interpretation to be given to Section 118 for purposes of this case. (Resp. Brief, pp. 32-33).[51]

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[50] See H.R. 91-1146, 91st Cong. 2d Sess. 34 (1970) and S. Rep. 91-1196, 91st Cong. 2d Sess. 100 (1970). The only law which provided for any such responsibility was the Air Quality Act of 1967, P.L. 90-148, 81 Stat. 485, Section 111 (b) which delegated this power to the Secretary of the Department of Health, Education, and Welfare.

[51] See pages 43-46, below.

III. FEDERAL FACILITIES MUST COMPLY WITH STATE PERMIT REQUIREMENTS IF THE PURPOSES OF THE ACT ARE TO BE ACCOMPLISHED.

In redrafting Section 118 and other provisions of the Act to clarify that existing federal facilities are subject to all state requirements respecting the control and abatement of air pollution, the Conference Committee recognized the necessity of pre-attainment regulation of all existing facilities — federal, as well as non-federal — as an integral part of a state's efforts to fulfill the requirements of its implementation plan and achieve and maintain national air quality standards. As stated above, in Kentucky and many other states it is solely through the issuance of operating permits that the State pollution control agency actually carries out such regulation.

Pursuant to the EPA-approved Kentucky implementation plan, no person is allowed to construct or operate an air pollution source unless a permit therefor has first been obtained from the Kentucky Air Pollution Control Commission,[52] which permit is subject to terms and conditions which the Commission deems necessary to insure compliance with

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[52] Kentucky Administrative Regulation AP-1, Section 5 (1). The Kentucky administrative regulations relevant to this case are printed in the appendix submitted to the Court of Appeals for the Sixth Circuit, pages 99-227.

its emission standards.[53] These conditional permits are then used by the Commission to enforce the essential provisions of the implementation plan relating to emission standards, compliance schedules, monitoring, record keeping and reporting, and emergency episodes.[54]

Although the comprehensive nature of the Kentucky permit system may not be as explicit as the permit systems of various other state implementation plans,[55] it is apparent from a review of Kentucky Administrative Regulation AP-1 in its

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[53] See Kentucky Administrative Regulation AP-1, Section 5 (4), which states as follows:

> "Permits issued hereunder shall be subject to such terms and conditions set forth and embodied in the permit as the Commission shall deem necessary to insure compliance with its standards. Such terms and conditions may include maintenance and availability of records relating to operations which may cause or contribute to air pollution including periodic source of stack sampling of the air contaminate sources."

See also Kentucky Administrative Regulation AP-1, Section 5(2)(a) and (c).

[54] Kentucky Administrative Regulations, AP-1, Sections 7-9 and 11.

[55] Cf., for example, the permit system set forth in the Alabama implementation plan, **State of Alabama v. Seeber,** 502 F.2d 1238, 1240-1242 (5th Cir. 1974). Although identical in operation to the Kentucky plan, the Alabama plan more explicitly sets out that air pollution emergency plans, sampling and monitoring requirements, and progress reports are all an integral part of the permit system. [Alabama Air Pollution Control Commission Rules and Regulations, 1.12.8 (b)-(d); 1.12.9 (b)]

It was for this reason that the State of Alabama desired to consolidate its case with the present case. Since there was apparently some confusion in the 6th Circuit with regard to the operational effect of the Kentucky permit system, Alabama wanted to insure that this Court had before it on direct review a record which presented, as explicitly as possible, the true nature of the permit mechanism. See **Seeber v. Alabama,** No. 74-851, "Respondents' Motion to Reconsider and Grant Petition for Writ of Certiorari and Motion to Consolidate," pages 3-16.

entirety (Sections 1-12) that it is solely through the use of conditional permits that the Kentucky Air Pollution Control Commission is able to coordinate the various essential elements of the Kentucky plan and ensure that the purposes of the Act are accomplished.

If deprived of the use of these conditional permits, the success of a state's pollution control program depends exclusively upon the willingness of the polluter to voluntarily cooperate with the state pollution control agency during the three year pre-attainment period. In their brief and throughout the course of this litigation, respondents have implicitly argued for such a system of voluntary compliance by federal facilities.[56]

But voluntary cooperation is not what Congress had in mind when enacting the 1970 Amendments. The legislative history of the Amendments reflects that Congress was totally dissatisfied with the earlier, more lenient air pollution acts, and was particularly aware of the slothful habits of federal facilities in requesting appropriations for pollution control devices and putting such devices into actual use pursuant to those laws. The many reports and hearings on the Amendments indicate time and again that rather than exercising

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[56] See, for example, Resp. Brief, pp. 8-10; App. 37-59.

Respondents do not contend, as did the Sixth Circuit, that Section 304 suits provide a means of **preventing** violations of emission standards as well as providing for after-the-fact enforcement of violations. **Kentucky v. Ruckelshaus,** above, at 1177. (App. 168). This contention is effectively answered in petitioner's brief, pp. 45-48, and other amici briefs.

leadership in controlling air pollution, federal facilities had been "notoriously laggard" in complying with the law.[57]

Nor has voluntary cooperation by federal facilities proven workable as a means of attaining emission and air quality standards. As one would have expected, the "willingness" to cooperate expressed years ago by the various federal facilities has been a poor substitute for the necessity of obtaining permits and fulfilling their conditions to which other facilities have been subjected, the result being that numerous federal facilities have only begun to take the requisite steps to achieve the compliance which non-federal facilities have already attained.

A case in point is respondent Tennessee Valley Authority. In spite of TVA's alleged willingness to cooperate with the

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[57] See, for example, S. Rep. No. 91-1196, 91st Cong. 2d Sess. 23, 37 (1970); H. R. Rep. No. 91-1146, 91st Cong. 2d Sess. 4, 5 (1970); and S. Cong. Rec. Vol. 116, Part 24, p. 32911, September 21. 1970.

Acceptance by this Court of respondents' argument that federal facilities are not subject to state permit requirements pursuant to Section 118 would be a step backward from the more lenient requirements of the 1963 and 1967 Acts since even under these laws federal facilities were subject to operating permits.

The original Clean Air Act, as enacted by Congress in 1955, made no reference to federal facilities. The 1959 Amendments, however, required operators of federal facilities to "cooperate" with state and local air pollution control agencies "to the extent practicable and consistent with the interests of the United States and with available appropriations. . . ." (Section 118; P.L. 88-365; 73 Stat. 646). This provision was then strengthened by an amendment to the Act of 1963, retained in 1967, authorizing the Secretary of HEW to establish classes of pollution sources and to require the operators of federal facilities to obtain permits from him before operating such sources. Operators of federal facilities were also required to provide the Secretary with information deemed relevant to the issuance of these permits. [1963 Act, Section 7(b), P.L. 88-206, 77 Stat. 392; and 1967 Act, Section 111, P.L. 90-148, 81 Stat. 485.]

Alabama Air Pollution Control Commission, and the consistent representation by its spokesmen that the May 31, 1975, deadline would be met without the necessity of submitting itself to the requirements of the Alabama permit system, TVA's own recently submitted data show that only one of eight coal-fired boilers at its Widows Creek Steam Plant in North Alabama is presently in compliance with relevant particulate emission standards, with presently projected compliance dates reaching into 1978. As a result of TVA's poor performance in this regard, it has been necessary for Alabama to file suit against TVA requesting the Court to enjoin the operation of the Widows Creek facilities and/or assess a compensatory daily fine to continue as long as TVA operates these facilities in violation of the law.[58]

The failure of the voluntary approach urged by respondents is not simply limited to their own respective facilities. Despite repeated attempts to have all federal facilities submit data to state pollution control agencies, (App. 83-85), EPA found it necessary, only a few weeks before the mandatory attainment deadline in most states of May 31, 1975, to publish guidelines:

> ". . . to determine the compliance status of all Federal stationary sources of air pollutants . . . and establish firm public commitments to abate emissions as expediti-

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[58] **State of Alabama v. Tennessee Valley Authority**, Civil Action No. 75-G2067NE, United States District Court for the Northern District of Alabama, filed November 3, 1975.

ously as practical from those facilities exceeding limitations."[59]

EPA's eleventh-hour attempt to exert authority over federal facilities in an effort to hasten compliance is simply too little too late. The State of Alabama submits that these same federal facilities would be in compliance, and the EPA guidelines would not be necessary, if only the states had been allowed to subject these federal facilities to the requirements of their respective permit systems three years ago.

Interwoven throughout respondents' brief, the 6th Circuit opinion, and the letters and memos written on this subject by respondent EPA, is the notion that there is something *per se* objectionable about an arm of the federal government being required to obtain an operating permit from a state agency — even when the Act specifically states that it must. Implicit in this notion, perhaps, is the fear of some form of arbitrary reprisal which may be levied against the federal facility by an irrational state agency. But as a practical matter, the best way for a federal facility to protect itself against the threat of a major legal attack by a state or citizen with possible severe consequences is by obtaining a permit and working with the state air pollution control agency pursuant to the conditions of that permit to ensure that compliance will be attained as soon as possible. These

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[59] 40 Fed. Reg. 20664. Ironically, respondents have attempted to use these guidelines to suport their argument that EPA has consistently interpreted Section 118 to mean that federal facilities are not subject to state permit requirements.

Read in conjunction with the earlier January 26, 1973, memorandum on this same subject (App. 83-85), these guidelines paint a picture of the futility of one federal agency attempting to have another federal agency comply with the law through friendly persuasion.

permits allow for a rational exchange of ideas and information, including public particiaption through required public hearings, as an alternative to litigation which, as this case has demonstrated, is to no one's advantage.

IV. THE ENVIRONMENTAL PROTECTION AGENCY'S INTERPRETATION OF SECTION 118 IS NOT ENTITLED TO SPECIAL CONSIDERATION.

Respondents contend that simply because the Environmental Protection Agency has stated its view that Section 118 does not require federal facilities to comply with state permit requirements, this view is entitled to special consideration. (Resp. Brief, pp. 31-34). As supporting authority for their position, respondents primarily rely upon the recent opinion of this Court in *Train v. Natural Resources Defense Council*, above.

In *Train*, the Natural Resources Defense Council filed a petition in the Court of Appeals pursuant to Section 307 (b)(1) of the Act, 42 U.S.C. 1857 h-5(b)(1), to review an EPA order approving certain provisions of Georgia's implementation plan relating to the allowance of individual source variances from the Act's mandatory 3-year compliance deadline. In its petition, the NRDC claimed that EPA had erroneously interpreted Section 110(a)(3) and 110(f) of the Act, 42 U.S.C. 1857 c-5(a)(3) and (f), which interpretation had first been incorporated in the *original EPA guidelines* promulgated for use by all the states in formulating their respective implementation plans.[60] The Fifth Circuit found

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[60] **Natural Resources Defense Council v. Environmental Protection Agency,** 489 F.2d 390, 393 fn. 1 (5th Cir. 1974), and **Train v. Natural Resources Defense Council,,** 43 L.Ed. 2d, at 741.

for petitioners, but this Court reversed. Citing *Udall v. Tallman*, 380 U.S. 1, 16-18, 13 L.Ed.2d 616, 85 S.Ct. 792 (1965), and *McLaren v. Fleischer*, 256 U.S. 477, 480-481, 65 L.Ed. 1052, 41 S.Ct. 577 (1921), the Court, speaking through Justice Rehnquist, noted that there had "undoubtedly been reliance upon its [EPA's] interpretation by the States and other parties affected by the Act" and, after a careful review of the language of the Act and its legislative history, concluded that the EPA construction of the Act had been "sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency."[61]

The State of Alabama submits that in no event can EPA's view of Section 118 be considered "reasonable" in view of the plain language and legislative history of the Act to the contrary, and the total failure of voluntary cooperation by federal facilities as an alternative means of accomplishing the general goals and objectives of the Act. Furthermore, and equally as important, the comments of the Court in *Train*, *Udall*, and *McLaren* clearly indicate that courts generally will defer to an administrative agency only where there has been a significant degree of detrimental reliance upon the agency's interpretation of the statute in question. Such is certainly not the case on the facts before us.

Here there were no regulations promulgated by EPA concerning an interpretation of Section 118, much less as a part of their original implementation plan guidelines as in *Train v. N.R.D.C.* To the contrary, EPA expressly approved the implementation plan submitted by the Commonwealth of Kentucky which provided for an extensive permit

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[61] **Train v. Natural Resources Defense Council**, 43 L.Ed. 2d, at 750; see also p. 743.

system as the principal mechanism for achieving national air quality standards in that state.[62]

The only three examples in the record of an EPA interpretation of Section 118 are an October 17, 1972, letter from the Regional Administrator of EPA to respondent Tennessee Valley Authority (App. pp. 55-59 and 79-82), a January 26, 1973, memorandum from EPA to all federal agencies, and the May 6, 1975, guidelines discussed in the previous section. But even the earlier October 17, 1972, letter was issued *after* approval of the Kentucky plan by EPA and after the Kentucky Air Pollution Control Commission had made several requests that respondents comply with applicable permit requirements (App. 35-54), and even then simply referred to the suggested guidelines in the letter as "our advice on this matter, at this time." (App. 57).[63] The January 26, 1973, memorandum expressing EPA's view on this subject was, of course, even later, and specifically referred to the fact that several court cases were already underway to determine the legality of state permits for federal facilities, and that the courts, would "resolve this issue." (App. 84-85). As for the May 6, 1975, guidelines issued by EPA, as discussed above, these were no more than an after the fact admission of the unworkability of respondents' scheme.

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[62] As noted above, fn. 15, not only was the Kentucky implementation plan approved by EPA generally, Kentucky's permit system was apparently the type procedure "encouraged" by EPA, whereas state plans providing for attainment of the national standards in three years without enforceable pre-attainment procedures to insure compliance were looked upon with disfavor. **Train v. N.R.D.C.**, 43 L.Ed. 2d, at page 740.

[63] The State of Alabama's action against the Tennessee Valley Authority involving the identical disputed issues was filed on October 20, 1972, almost one month earlier than the Kentucky action, and only three days after the October 17 letter.

The fact of the matter is that there was a dispute between Kentucky and the federal facility respondents from the first moment that the federal facilities refused to comply with the requirements of the Kentucky permit system, and only substantially later did EPA come in on the side of its fellow federal agencies. To now contend that EPA's position on this issue should be accorded extra weight in resolving this dispute is a bootstraps argument of the greatest magnitude.

Nor can the federal facility respondents claim to be injured in any respect if they are now required by this Court to obtain a Kentucky permit. To the contrary, it is the states and their respective citizens who are presently suffering the consequences of respondents' decision to contest Kentucky's authority to regulate them prior to the emission deadline.

Respondents' final comments with regard to Executive Order 11752, the Administrative Conference, and pending federal legislation (Resp. Brief, pp. 32-34) are totally irrelevant to the issues before this Court, and only serve to emphasize the desperate nature of their argument.

V. THE WATER POLLUTION CONTROL AMENDMENTS OF 1972 CONFIRM THAT EXISTING FEDERAL FACILITIES MUST COMPLY WITH STATE PERMIT REQUIREMENTS UNDER THE AIR ACT.

The State of Alabama submits that its interpretation of Section 118 gains additional support from the plain language of the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. (Supp. III) 1251, *et seq.* (the "Water Act"), which established a nationwide scheme of water pollution control analagous to the federal-state scheme established by the Clean

Air Amendments of 1970.

Like the predecessor Air Act, the Water Act places the primary responsibility for pollution control in the states, providing for state water pollution control programs, promulgated pursuant to specific guidelines and subject to approval by the Environmental Protection Agency, as the primary mechanism for fulfilling this responsibility. Similarly, the Water Act recognizes that state authority over *all* pollution sources is necessary for the state programs to succeed, and specifically provides, therefore, that all federal facilities "shall comply with Federal, state, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements . . ." Section 313, 33 U.S.C. (Supp. III) 1323, language derived from, and virtually identical to, Section 118 of the Air Act.

Because of this virtually identical language in Section 118 of the Air Act and Section 313 of the Water Act with regard to state control over federal facilities, and because of the strong similarity of the two Acts generally, it is possible that an analysis of other provisions of the Water Act may assist this Court in its resolution of that language as applied to the Air Act — and this is indeed the case. When read in conjunction with one another, it is apparent that both the Water Act and the Air Act require that federal facilities comply with *all* state requirements respecting the control and abatement of air pollution, including state permit requirements.

The Water Act shares with the Air Act many of the important provisions relied upon by Alabama in its brief, below,[64] but, more importantly, each respective Act contains

[64] Cf., especially, Section 116 of the Air Act, 42 U.S.C. 1857 d-1, and Section 510 of the Water Act, 33 U.S.C. (Supp. III) 1370.

unique provisions which serve to rebut the arguments forwarded by the federal facilities with regard to the *other* Act. For example, the petitioners' position in the consolidated case of *EPA v. California,* No. 74-1435, is substantially weakened by the fact that the Air Act specifically provides in Section 114 (b) (1) that states *may* implement and enforce informational requirements with regard to existing federal facilities.[65] Similarly, the specious nature of petitioners' argument in *EPA v. California* with regard to the weight to be given EPA's interpretation of Section 313 of the Water Act is less plausible when viewed in context of the facts of the present case which provide no support whatsoever for their position.

More important to the issues before this Court in the present case, however, is the fact that the citizen suits provision of the Water Act, expressly equates a Section 313 "requirement" with a state permit. Section 505 (f), 33 U.S.C. (Supp. III) 1365 (f).[66] This clarifying language in itself is enough to confirm the fact that Congress intended that federal facilities be required to comply with state permit requirements when it passed the Clean Air Act.

The State of Alabama submits that there is no reason whatever to presume that Congress would have used the same language in Section 313 of the Water Act as it had used in Section 118 of the Air Act without intending those provisions to be applied in the same manner, and the provisions of both Acts mutually support the fact that this

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[65] See petitioner's brief in **EPA v. California,** pp. 27-28. See also Section 111 (d) of the Air Act, discussed below on page 22.

[66] See p. 19 of California's brief in **EPA v. California** for a more complete discussion of this provision.

language was intended to subject federal facilities to state permit requirements with regard to both water and air pollution control.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals, below, should be reversed, and respondents directed to apply to the Kentucky Air Pollution Control Commission for a conditional operating permit.

Respectfully submitted,

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